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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-48

FRANCIS X. LAWLOR, et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Respondents respectfully submit that the judgment and opinion in this cause of the United States Court of Appeals for the Seventh Circuit correctly stated the law as enunciated in prior decisions of this Court and other lower courts. The judgment and opinion are not in conflict with any decision of any other Court of Appeals and raise no important issue of federal law.

QUESTIONS PRESENTED.

Whether the Court of Appeals was correct in holding that:

1. The District Court did not err in dismissing petitioner's second amended complaint since the allegations thereof taken as true did not show a "deprivation of constitutional rights" necessary to sustain such complaint.

2. It is plain from the complaint that the O'Toole School boundaries were not drawn to "force" whites out or induce blacks to enter; the Board's permissive transfer plicies did not discriminate against whites or blacks, and its construction policies did not deny protection to either race.

3. The declaration sought by petitioners with respect to limiting "black students" to a 10-25% range in the O'Toole area schools would deny equal protection of the law to black people for there is no substantive constitutional right to any particular degree of racial balance or mixing.

4. The mere fact of imbalance of races is not alone a deprivation of equality of educational opportunity in the absence of purposeful, invidious discrimination.

STATEMENT OF THE CASE.

The petitioners, in their second amended complaint, claim denial of constitutional rights by the respondent Board's administrative actions which allegedly have "forced" "white" residents to move out of, and encourage the segregation of "black people" within, the O'Toole Elementary School area and its schools. The Circuit Court affirmed the action of the District Court in sustaining the respondents' motion to strike said complaint and dismiss the action.

The complaint alleges, in general and conclusory terms, that prior to 1967 the O'Toole area was a "white residential area" with only "a few, if any, black persons"; that as a result of certain "practices and policies" of the Board the number of black students in the area schools has risen to over 10-25%; that this rapid influx of blacks has caused or is causing whites to be "forced" and "driven" out of their schools, homes and businesses; and that the area schools have become or are becoming segregated (A. 3-13).[1] The Board's "practices and policies" complained of include the following: 1) boundary changes in school attendance areas; 2) reclassification of general attendance to special purpose schools (i.e., technical); 3) construction of temporary school facilities to cure overcrowding; 4) a system of "permissive transfers" whereby students from overcrowded schools located in the city can transfer to under-utilized "receiving schools" including schools in the O'Toole area (A. 8, 23).

Petitioners' complaint seeks a judicial declaration that they have been denied due process and equal protection of law by respondents' alleged invidious administrative "practices and policies". They also seek an injunction limiting to a range of 10-25% the number of black students in the O'Toole area schools.

[1] "A" refers to the Appendix in the Court of Appeals.

REASONS FOR DENYING THE WRIT.

I.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE JUDGMENT OF THE DISTRICT COURT DISMISSING PETITIONERS' COMPLAINT SINCE ITS ALLEGATIONS, TAKEN AS TRUE, DO NOT SHOW A DEPRIVATION OF CONSTITUTIONAL RIGHTS.

Under the provisions of the Illinois Constitution and the Statutes, the respondents have the authority and responsibility to take the very action of which petitioners complain, i.e., establishing school attendance areas, permissive transfer programs, temporary school facilities, reclassification of schools and upper grade centers. The Illinois Constitution (Art. X., Sec. 1) requires the State to provide an efficient system of free public schools. The Illinois School Code (Sec. 34-18, Ch. 122, Ill. Rev. Stats., 1971) gives the Board general supervision and management of the public school system of the city with power to provide schools of all grades and kinds including vocational and technical schools. The Board is therein further authorized to divide the city into sub-districts and proportion the pupils to the several schools provided no pupil is excluded from or segregated in any such school on account of his color, race or nationality.

The complaint fails to allege that there has been any boundary change of the O'Toole or any other school. The complaint further fails to allege that any Board action, in changing school boundaries, transfer plans, temporary school facilities, reclassification of schools, or creation of upper grade centers or any other action, was taken in violation of the Constitution on the basis of race or that any child was excluded from or included in any such program on a racially discriminatory basis.

Instead, the complaint contains conclusions and arguments that unspecified "practices and policies" of respondents are

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producing a "rapid and drastic increase in the number of black students attending schools" (A. 5); that respondents are aware that the "invariable result" has been segregation driving petitioners out of their schools, homes and businesses in spite of their "desire" to remain (A. 6); and that the extension of segregation has been the "foretold, foreknown and inevitable consequence" (A. 7-9).

Under these circumstances, the Court of Appeals properly affirmed the judgment of the District Court, saying in its opinion (a. 3a)[2]:

> "We hold that the District Court did not err in dismissing the petitioners' complaint since the allegations thereof, taken as true, do not show a 'deprivation of constitutional rights' necessary to sustain petitioners' complaint." *Ehrlich* v. *Van Epps*, 428 F.2d 363, 364 (7th Cir. 1970); *Sarelas* v. *Sheehan*, 326 F.2d 490, 491 (7th Cir. 1963); *Kamsler* v. *M.F.I. Corp.*, 359 F.2d 752 (7th Cir. 1966).

The Court of Appeals rightly held, on the basis of a fair reading of the complaint with its allegations taken as true, that said complaint does not state a denial of petitioners' constitutional rights upon which civil rights relief can be granted. The Court said (a. 3a):

> "But a fair reading of the complaint, with the allegations taken as true, clearly *does not state a denial of plaintiffs' constitutional rights upon which civil rights relief can be granted.* General allegations of the Board's misconduct are limited by other statements and assertions which refute the claims of constitutional misconduct. It is plain from the complaint that the O'Toole School attendance boundaries were not purposefully drawn to 'force' whites out or induce blacks to enter. There is no intimation that the operation of the permissive transfer policy discriminated against whites or blacks, or that the construction policies denied equal protection to either

[2] "a" refers to the Appendix to the Petition for Writ of Certiorari.

> race. And plainly there is no basis for an inference that plaintiffs have been deprived of any liberty or property without due process." (emphasis added)

Just as they did in the Court of Appeals, petitioners attempt to beg the question in this case by conclusion and argument (Petition 3,4,11, 12) that respondents' "practices" have caused "rapid and drastic increases" in the numbers of black students and the rate at which whites have left the schools and homes in petitioners' area. There are no facts in the record to support such argument. On the contrary, the complaint (A-13) and petition (p. 1) admit on their face that the racial change in the schools resulted from the rapid racial change in the residential community.

Petitioners nonetheless asked the Court to enter an order to "reduce the percentage of black students" and eliminate the "existing surplus" of such students to a maximum range of 10-25% (A. 15-17). In rejecting such argument and holding that such action would be in direct violation of the Civil Rights Act and the Fourteenth Amendment of the Constitution, the Court of Appeals held (a, 4a):

> "Furthermore, the declaration sought with respect to limiting 'black students' to a 10-25% range within the O'Toole area schools would deny equal protection of the law to the black people desiring to move into the area and to their children desiring to attend the O'Toole School. And there is no substantive constitutional right to any particular degree of racial balance or mixing. *Swann* v. *Board of Education*, 402 U.S. 1, 24 (1971). Finally, assuming defendants are deliberately applying the alleged 'practices and policies', we see no justification–absent a substantial showing of denial of plaintiffs' rights–for a declaration that the policies are individually discriminatory, or for the injunctive relief sought.
>
> The complaint effectually states that racial imbalance results when other whites leave the neighborhood area and its schools, in response to attendance of black students

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exceeding a range of 10-25%. But the Board policy of permitting black student attendance in excess of 10-25% at the racially changing schools is shown by the complaint not to be the legally sufficient cause of subsequent racial imbalance, since the complaint states that whites move away from the area because blacks move in. And plaintiffs have not shown their standing to complain of deprivation of rights from racial imbalance in schools, resulting solely from departure of other whites, in response to an influx of blacks."

II.

THE JUDGMENT AND OPINION OF THE COURT OF APPEALS HEREIN IS NOT IN CONFLICT WITH ANY DECISION OF ANY OTHER COURT OF APPEALS AND RAISES NO IMPORTANT ISSUE OF FEDERAL LAW.

Petitioners argue (Petition, 7) that this case presents two important questions of constitutional Law: A. Whether "State action," taken with knowledge that its "inevitable consequence", must be segregation, constitutes discrimination violative of equal protection of the laws, and, B. Whether "such State action" violates equal protection of the laws irrespective of "intent".

The simple direct answer to these questions is that: A. The complaint here is devoid of any specific allegation of "State action" of segregation, discrimination, or denial of equal protection of the laws; and, B. In the absence of such "State action" no question of "intent" is in any way involved in this case.

Just as they did in their brief in the Court of Appeals (33, 12-59), petitioners have attempted to confuse the issue in this case by arguing at great length in their petition (8-10, 12-18) that lack of discriminatory intent will not protect "state action producing an inescapably discriminatory effect" (12). The defense in this case has never been based on a contention that no discrimination was intended. Respondents' motion to strike

and dismiss, sustained by the District Court and affirmed by the Court of Appeals, was simply based on the failure of petitioners to state a claim showing petitioners had been deprived of any right, privilege or immunity secured by the Constitution and law. Thus, the cases discussed in the petition, wherein unconstitutional discriminatory action existed and an attempt was made to defend on the basis of lack of discriminatory intent, have no application in the instant case. No discriminatory action is alleged in the complaint here before the Court.

The principal case upon which petitioners rely is *Keyes* v. *School District No. 1, Denver, Colorado*, 303 F. Supp. 279, 289 (D. Colo. 1969); 313 F. Supp. 61, 90 (D. Colo. 1970). The argument made by petitioners in the Court of Appeals, that the policies and practices in *Keyes* were strikingly similar to the ones here, is dead wrong. In this case there is no discriminatory action by respondents in the record. In *Keyes*, the Court found in its opinion (p. 285) that defendants had opened a school in a segregated black area (Barrett) with conscious knowledge it would be a segregated school at the same time that a near-by school in a white area (Stedman) was operating 20% over capacity; Barrett was built as a small school not utilized to relieve overcrowding at Stedman; the Board refused boundary changes recommended by its superintendent to relieve overcrowding at Stedman; other boundary changes added to the black pupil concentration; white students were transferred to white schools; and 28 mobile classrooms were built in the Park Hill area of Denver, resulting in a concentration of Negro enrollment at a time when only 29 such units existed in all of Denver. On the basis of this *de jure* action, unlike the situation in this case, the Court in granting an injunction said at page 287:

> "It is sufficient to say that we are not here faced with the kind of simple or innocent de facto segregation which was found to exist in *Downs*. We have seen that during the ten year period preceding the passage of Resolutions 1520,

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1524 and 1531, the Denver School Board has carried out a segregation policy."

After trial on the merits in *Keyes* the court held (313 F. Supp. 61, 67) that the rescission of the integration plan of the predecessor board was designed to perpetuate segregation and in and of itself an act of *de jure* segregation. However, at page 73 the court stated, with regard to *de facto* segregation, "the rule is that the court cannot order desegregation in order to provide a better balance."

The argument made in the petition (p. 18-20) that respondents have an affirmative duty to ameliorate all manifestations of segregation was effectively disposed of by the Court of Appeals in its opinion in this case, where it stated (a, 4a):

> "If separation in racially imbalanced schools were the result of unlawful discrimination, school officials would be under an affirmative duty to remedy the situation. However, the mere fact of imbalance of races is not alone a deprivation of equality of educational opportunity in the absence of purposeful invidious discrimination. *Deal* v. *Cincinnati Board of Education*, 369 F. 2d 55, 62 (6th Cir. 1966), *cert. den.* 389 U.S. 847; *Springfield School Comm.* v. *Barksdale*, 348 F.2d 261, 264 (1st Cir. 1965); *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988 (10th Cir. 1964), *cert. den.* 380 U.S. 914; *Bell* v. *School, City of Gary*, 324 F.2d 209 (7th Cir. 1963), *cert. den.* 377 U.S. 924. *See also Offermann* v. *Nitkowski*, 378 F.2d 22, 24 (2nd Cir. 1967).
>
> In all cases cited by plaintiffs, denials of constitutional rights are involved. For example, in *Monroe* v. *Pape*, 365 U.S. 167 (1961), the complaint alleged the invasion and search of the Monroe home by police without a warrant. In *Gommillion* v. *Lightfoot*, 364 U.S. 339 (1960), relief was granted because certain 'boundary changes' would have deprived plaintiffs of their right to vote. In *Goss* v. *Board of Education*, 373 U.S. 683 (1963), black students were limited to transferring to schools where their race represented a majority.

> We hold that plaintiffs' complaint is fatally deficient for lack of a showing of denial of constitutional rights. There is no basis therefore for the contention that defendants have an affirmative duty to 'ameliorate all manifestations' of *de facto* segregation which has developed in the O'Toole area. Absent violation of plaintiffs' constitutional or other federal rights, plaintiffs have no basis for their claim of civil rights relief.
>
> The recent decisions relied on by plaintiffs avail them nothing. In both *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D.Cal. 1970); and *Bradley* v. *Milliken, et al.*, U.S.D.C. (40 U.S.L.W. 2192), there was evidence of discriminatory practices and policies which impinged on plaintiffs' ('black students') constitutional rights to equal school facilities and educational equality."

The respondents submit that the petitioners have utterly failed to show that the judgment and opinion of the Court of Appeals in this case is in conflict with any decision of any other Court of Appeals or that it raises any important issue of Federal law.

CONCLUSION.

The Court of Appeals' judgment and opinion in this case follow judicial precepts. It is in accordance, not in conflict, with prior judicial decisions and sets forth a correct statement of the law. For these reasons, as well as the reasons contained in the body of this brief, respondents respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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